NO. 15400

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT EMMETT HOYT,
Appellant,

v.s

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

ANDERSON, FRANKLIN & O'BRIEN,
BEN ANDERSON,
333 American Bank Building,
Portland 5, Oregon,
For Appellant.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY;
WAYNE WILLIAMSON,
1001 Board of Trade Building,
Portland 4, Oregon,
For Appellee.

STEVENS-NESS PORTLAND, ORE. 3-57

SUBJECT INDEX

TABLE OF AUTHORITIES

NO. 15400

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT EMMETT HOYT,
Appellant,

v.s

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTION OF THE COURT

This action was brought by a boiler inspector seeking to recover overtime pay.

Jurisdiction of the United States District Court for the District of Oregon was invoked under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. A., paragraphs 201 to 219, inclusive).

The United States Court of Appeals has jurisdiction to review the judgment in question under U. S. C. A., title 28, sec. 1291.

The pleading necessary to show the existence of the jurisdiction appears on page 3 of the printed record.

STATEMENT OF CASE

Appellant was employed by appellee as a boiler and machinery inspector from 1950 to May 15, 1955. His work was carried out in the States of Oregon and Washington (Tr. 28).

Appellee is an insurance company engaged in interstate commerce. Among its functions it insures steam boilers, pressure vessels and various types of mechanical devices in the various States (Tr. 12).

In the territory assigned to appellant he had from twelve to nineteen hundred units to inspect in Oregon and Washington (Tr. 28).

Appellee provided appellant with a car and travel expenses and during the time in question a salary of four hundred dollars per month (Tr. 29). Appellant arranged his own schedule of time, except that in emergencies and accidents he was on call (Tr. 29).

Appellee's chief inspector was located in Seattle, Washington. Appellant worked under the direction of appellee's supervisor, who maintained an office in Portland, Oregon (Tr. 28).

Inspections were made to determine the safe operation of the units involved and appellant made reports to his superiors on forms furnished by appellee (Tr. 30).

Appellee in its amended answer set up the following defenses:

(1) That appellant was an administrative employee within the meaning of the Fair Labor Standards Act of 1938.

(2) That appellant was a professional employee within the meaning of said Act, and was therefore exempt from its provisions.

(3) That appellant was not required to work more than 40 hours per week (Tr. 14).

The Court below held that appellant was an administrative and professional employee within the meaning of the Fair Labor Standards Act of 1938 and was not subject to the Act (Tr. 22).

APPELLANT'S SPECIFICATION OF ERROR

The Court below erred in that the Court's Findings of Fact are not supported by the evidence, but are contrary to the evidence, particularly Findings of Fact numbered III, IV, V, VI, VIII, IX and X, and the Court erred in failing to hold that appellant at the time of his employment with appellee was subject to and entitled to the benefits of the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. A., Section 201 et seq.

ARGUMENT

The particular question before the Court is whether appellant was exempt from the Fair Labor Standards Act under the provisions of Section 213 (a) (1) and (2), of the Act, which provides exemptions in certain types of employment.

The exemption section of the statute provides in part that the Act does not apply to:

> "* * * any employee employed in a bona fide executive, administrative, professional, or retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the administrator); * * *"

THE REGULATIONS

The regulations involved are as follows:

"541.2 Administrative

The term 'employee employed in a bona fide * * * administrative * * * capacity' in section 13 (a) (1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $75 per week (or $200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section."

"541.3 Professional

The term 'employee employed in a bona fide * * * professional * * * capacity' in section 13 (a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of work:

(1) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Original and creative in character in a recognized field of artistic endeavor (as opposed to

work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $75 per week (or $200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof;

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section."

THE EVIDENCE

In determining whether employees are exempt under subsection (a) (1) of Section 213 as executive, administrative, or professional employees, each case must stand on its own facts.

The following is an abstract of the undisputed evidence relating to the nature of appellant's employment.

Appellant spent about 75 or 80 percent of his time on inspection. If he found serious defects he would telephone the home office. He had strict orders not to make any "on-the-spot condemnations" (Tr. 30, 31).

Appellant's training qualifying him as an inspector was as a marine engineer, a machinist apprentice. No technical schooling (Tr. 31). He went around for about two weeks with another inspector. He held a national card and a state inspector's license (Tr. 32).

The mechanics of inspecting a boiler was to check safety appliances, look for corrosion or deterioration. He was required to crawl into boilers and furnaces (Tr. 32). He used his employer's tools, such as hammer, flashlight, gauges, tape measure, and pump for hydrostatic tests. His work clothes were overalls. He worked irregular hours and his salary was $400.00 per month (Tr. 32).

Appellee, at the time of trial, had 25 inspectors working under the supervision of its Seattle office, none of whom had a college degree in engineering. Very little training is required where an inspector comes from another company, "but if a man comes with no previous

training, it may take from 3 months to a year before the employer thinks that man is capable of accepting a territory" (Tr. 127-128).

The administrator has set up regulations defining the terms: executive employee, administrative employee and professional employee, and the courts have generally held that such regulations have the force and effect of law.

In the case of *Heliwell v. Haberman,* 140 F.2d 833, the Court said:

> "Under the section exempting executive employees as defined and delimited by Wage and Hour Administrator, his regulations setting out in the conjunctive six conditions to constitute an executive employee have the force of law, and hence before an employee may be denied overtime payment as an executive the six conditions must be fulfilled."

In *Tobin v. Johnson,* 198 F.2d 130, the Court said:

> "The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all able-bodied working men and women a fair day's pay for a fair day's work, and any exemption from such humanitarian and remedial legislation must be narrowly construed, giving due regard to plain meaning of statutory language and intent of Congress."

In *Durkin v. Joyce Agency,* 110 F. Supp. 918, the Court said:

> "In determining whether employees are within the exemption provisions of Fair Labor Standards Act, courts may look to administrator's bulletins for guidance."

The United States Department of Labor, Wage and Hour Division, publishes periodical explanatory bulletins prepared by the administrator, which bulletins seek to explain the proper application of the regulations.

The courts have generally held that such explanatory bulletins are of value in determining whether workers are exempt.

In the case of *Vives v. Serralles,* 145 F.2d 552, the Court held that an interpretative bulletin promulgated by the administrator of the Wage and Hour Division, defining terms, is of value in determining whether workers are exempt, and in *Durkin v. Joyce,* 110 F. Supp. 918; 211 F.2d 241, the Court said:

> "In determining whether employees are within exemption provisions of this chapter, courts may look to administrator's bulletins for guidance."

The following language is quoted from the administrator's explanatory bulletins, defining the terms executive, administrative and professional, as contained in Section 13 (a) (1) of the Fair Labor Standards Act of 1938, said bulletin issued and dated August, 1953:

Administrator's Explanatory Bulletin
(August 1953),

Regulations Part 541, page 12:

"DISCRETION AND INDEPENDENT JUDGMENT

(c) DISTINGUISHED FROM SKILLS AND PROCEDURES.

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of the regulations. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specified standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations."

Administrator's Explanatory Bulletin
(August 1953),
Regulations Part 541, page 11:

"(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the managaement or operation of the business that it can be said to be 'directly related to management policies or general business operations' as that phrase is used in the regulations."

Administrator's Explanatory Bulletin
(August 1953),
Regulations Part 541, page 16:

"(a) The 'learned' professions are described in the regulations (par. 541.3 (a) (1)) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

"(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high-school level.

"(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

"(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience."

In the following cases, boiler and machinery inspectors have been held to come within the terms of the Fair Labor Standards Act unless excluded by a "Belo" type of contract that was drawn into controversy in *Walling v. Belo,* 316 U. S. 624, which was decided in 1942.

Such contracts have received further sanction by the 1949 amendment to the Fair Labor Standards Act of 1938, Sec. 7 (e) which provides for certain conditions under which an employee may work in excess of 40 hours and be exempt by reason of contract.

No exemption is claimed under such contract in the case at bar.

In the case of *Walling v. Halliburton Company,* 331 U. S. 17, plaintiff was engaged in testing and servicing oil wells, and was held to be under the act except exempt under a "Belo" type contract.

In *Mitchell v. Hartford Steam Boiler Inspection and Insurance Company,* 12 Wages and Hour Cases 498;

United States District Court, District of Connecticut; 28 C.C.H. Labor Cases, Case 69192, the court dealt with a boiler inspector's claim. The court made the following findings of fact:

"1. Plaintiff is Secretary of Labor of the United States.

2. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Connecticut, having its principal office and place of business at 56 Prospect Street in the City of Hartford, Hartford County, State of Connecticut, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business and elsewhere in the casualty insurance business.

3. Defendant is engaged in interstate commerce within the meaning of the Fair Labor Standards Act.

4. Approximately 600 of the field employees of defendant, known as inspectors, are employed under guaranteed wage contracts purporting to establish an hourly rate of pay for the first 40 hours in each work week, with time and one half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked.

5. The nature of the employment of the inspectors necessitates the irregular hours of work per week, typically fluctuating between 35 and 50 hours, and exceeding 60 hours in not more than ¼ of 1% of the weeks worked.

6. The form of contract adopted was intended to continue the weekly wage method of payment in effect for inspectors prior to the adoption of the Fair Labor Standards Act.

7. The hours of employment per week were ex-

pected to fluctuate, but to be kept below 60 hours in all but the most exceptional cases.

8. It is the practice of defendant to assign to each inspector a territory within the area of a branch office, within which territory are located approximately 1200 insured objects for the inspection of which the inspector is responsible.

9. In each branch office the inspection service is headed by a chief inspector, under whom work supervising inspectors in sufficient number to provide one for each four to eight field inspectors.

10. Each field inspector arranges his own schedule of inspections, averaging about 1500 object inspections a year.

11. The objects insured and inspected are steam boilers, pressure vessels, and machinery of various types.

12. The inspectors are charged with determining in the first instance the suitability of the objects for insurance and thereafter their suitability for continued safe operation.

13. A detailed daily report on forms furnished by defendant of the condition of each object inspected is sent by the inspector to the branch office, where it is reviewed by the supervising inspector, edited, typed and reported to the assured.

14. More than 20% of the time of each inspector is spent in the physical inspection of insured objects.

15. If defective or unsafe conditions are found, the inspector's duty is to report them both to the insured and defendant, and to arrange with the assured for their correction, with power if necessary to suspend the risk immediately if the assured declines to discontinue unsafe operation.

16. The power of suspension is occasionally, although quite rarely, used by the inspectors.

17. A majority of the field inspectors are recruited from marine engineers, with experience in boiler operation. A minority have had college or technical school education. A typical field inspector has had a high school education, with three to five years practical experience in boiler or electrical machinery operation.

18. On original hiring, each inspector is given a short training course of one or more weeks of theoretical instruction, followed by one to three months or more experience with an inspector in the field, supplemented thereafter by bulletins and house organ articles."

It appearing that the inspector was working under a "Belo" type of contract the Court made the following conclusions of law:

"1. The Court has jurisdiction of the parties and subject matter of the action.

2. The field inspectors of the defendant are not exempt from coverage of the Fair Labor Standards Act as administrative employees.

3. Employment and payment of the field inspectors by the defendant under its present form of guaranteed weekly wage contract is in conformity with Section 7 (e) of the Fair Labor Standards Act as amended and is not in violation of any provision of the Act.

4. Defendant is entitled to judgment dismissing the action."

Except as to the "Belo" type of contract, we submit there is no distinction between *Mitchell v. Hartford* and the case at bar.

A number of cases and explanatory matter dealing with exemptions under the Fair Labor Standards Act of

1938, appear in an annotation in 40 A.L.R. 2nd, page 332.

We submit that appellant does not come under the exemption provisions of the Fair Labor Standards Act of 1938 as amended.

Respectfully submitted,

ANDERSON, FRANKLIN & O'BRIEN,

By BEN ANDERSON,
Attorneys for Appellant.